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**COURT OF CRIMINAL APPEALS
OF TEXAS**

Matthew Joseph Allen

v.

The State of Texas

From the Court of Appeals for the
Fifth Judicial District at Dallas

05-17-00226-CR

STATE'S BRIEF ON THE MERITS

An appeal from the 380th District Court
Collin County, Texas

Greg Willis
Criminal District Attorney
Collin County, Texas

John R. Rolater, Jr.
Chief of the Appellate Division

Amy Sue Melo Murphy
Assistant Criminal District Attorney
State Bar No. 24041545
2100 Bloomdale Rd., Suite 200
McKinney, TX 75071
(972) 548-4353
asmurphy@co.collin.tx.us

Identity of Parties & Counsel

Appellant .... Matthew Joseph Allen

Paul Stuckle
The Law Office of Paul Stuckle
1001 20th St.
Plano, TX 75074
Trial Counsel

Marc Fratter
The Law Office of Marc Fratter
1207 West University Drive
McKinney, TX 75069
Appellate Counsel

Appellee .... The State of Texas

Greg Willis
Criminal District Attorney
Collin County, Texas

John R. Rolater, Jr.
Chief of the Appellate Division

Shannon Miller
Peter Ganyard
Assistant Criminal District Attorney
Trial Counsel

Amy Sue Melo Murphy
Assistant Criminal District Attorney
Bar No. 24041545
Appellate Counsel
Counsel of Record
2100 Bloomdale Rd., Suite 200
McKinney, TX 75071

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Statement of the Case

Appellant pleaded not guilty to, and a jury convicted him of, one count of continuous sexual abuse of a child under the age of fourteen and two counts of indecency with a child—one count of indecency with a child by contact and one count of indecency by exposure.[1] CR 19-21, 244-246, 262-68; 5 RR 83-84. The jury set punishment for continuous sexual abuse at thirty-five years' confinement and at five and ten years' confinement for the two counts of indecency with a child. CR 257-68; 6 RR 80-81.

The court of appeals affirmed Appellant's convictions for continuous sexual abuse of a child and indecency with a child by contact, and reversed the conviction for indecency with a child by exposure. *Allen v. State*, No. 05-17-00226-CR, 2018 WL 3434545, at *5 (Tex. App.—Dallas July 17, 2018, pet. granted) (opinion on original submission) (not designated for publication) (*Allen I*). Both parties filed motions for rehearing, and the court of appeals denied both motions but withdrew their original opinion. *Allen v. State*, No. 05-17-00226-CR, 2018 WL

[1] Appellant was originally charged with nine counts, but after presenting its case-in-chief, the State abandoned six counts. CR 19-21; 5 RR 8-15.

6065095, at *1 (Tex. App.—Dallas Nov. 20, 2018, pet. granted) (op. on reh'g) (not designated for publication) (*Allen II*). In its new opinion, the court of appeals again affirmed Appellant's convictions for continuous sexual abuse of a child and indecency with a child by contact, and reversed the conviction for indecency with a child by exposure. *Id.* at *6.

Statement of Facts

The Offense

When the victim was in the middle of fourth grade, her step-father, Appellant, made her touch his penis when he put her to bed at night. 3 RR 235, 241; 4 RR 178-79, 202. This happened once a month until her family moved to Iowa the summer between fourth and fifth grades. 4 RR 187. The abuse worsened and became more frequent in Iowa, ultimately leading to Appellant penetrating the victim's vagina with his finger. 4 RR 183-87. The victim and her family moved back to Texas when she was in the middle of the seventh grade. 3 RR 244. Once back in Texas, Appellant made her hand touch his penis once or twice more, and then the abuse abruptly stopped. 4 RR 189. The victim was eighteen years' old at the time of trial. 4 RR 170.

Appellant testified at trial. He admitted that he enjoyed manipulating his family and agreed that he had a bad temper, but denied sexually abusing the victim. 5 RR 17-23.

<u>The Court of Appeals</u>

In its first opinion, the court of appeals agreed with the State that the evidence was sufficient to support Appellant's convictions for both continuous sexual abuse of a child and indecency with a child by contact. *Allen I*, 2018 WL 3434545, at *5. In reaching its holding with regard to the sufficiency of the evidence to support Appellant's conviction for indecency with a child by contact, the court of appeals modified the judgment to reflect that the offense occurred in December 2011. *Id.* Both parties filed motions for rehearing. The State alleged that when the court of appeals chose the December 2011 date for the indecency with a child by contact conviction, it created a double jeopardy issue because that date was within the time period that the continuous sexual abuse of a child was alleged to have occurred in the indictment—October 1, 2009 through August 15, 2012.

The court of appeals denied both the State and Appellant's motions for rehearing. *Allen II*, 2018 WL 6065095, at * 1. Instead, it withdrew its previous opinion and issued a new opinion. *Id.* In its new opinion, the court of appeals made clear that despite the fact that the State alleged in the indictment that the offense of continuous sexual abuse of a child occurred on or about October 1, 2009 through August 15, 2012, the proof at trial was that it occurred around the middle of the 2008-09 school year into the summer of 2009, before the family moved out of state. *Id.* at *2. Thus, the court of appeals held that the "2011 offense of indecency with a child by contact occurred well outside the statutory period during which [A]ppellant committed continuous sexual abuse of a child, i.e., between the middle of the 2008-2009 school year and the summer of 2009." *Id.* at *5. Consequently, the court of appeals held that the offenses did not occur within the same period of time and there was no double jeopardy issue. *Id.*

<u>Issue Granted for Review</u>

Did the panel err when it failed to find the evidence was legally insufficient to support the jury's finding of guilt beyond a reasonable doubt as to each and every element of the offense of indecency with a child by sexual contact, especially considering it unilaterally substituted a date of the offense contradictory to the indictment and the court's charge which created double jeopardy issues?

Summary of the Argument

The court of appeals did not err in holding that the evidence was sufficient to support Appellant's conviction for indecency with a child by contact. Appellant's only argument regarding the sufficiency of the evidence is that the trial court granted his motion for directed verdict for other counts that were alleged to have occurred on the same date. But the record shows that Appellant did not move for a directed verdict on this count. Instead, the record shows that the trial court granted Appellant's motion for directed verdict on the other counts because the State abandoned them. In any event, the evidence was sufficient to support Appellant's conviction. The victim testified that after the family moved back to Princeton, Texas from Iowa in December of the seventh grade, Appellant forced her to put her hand on his penis. And evidence at trial showed that the family moved back to Texas in December 2011.

Appellant next appears to argue that the court of appeals erred in relying on this evidence to hold the evidence sufficient to support his conviction because a different date was alleged in the indictment. Contary to Appellant's assertions, the court of appeals did not err in holding that the indecency offense occurred in December 2011 because it is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and is within the statutory limitation period.

Finally, Appellant argues that the court of appeals erred in holding that because the 2011 offense of indecency with a child by contact occurred well outside the statutory period during which Appellant committed continuous sexual abuse of a child, i.e., between the middle of the 2008-2009 school year and the summer of 2009, there was no double jeopardy concern in this case. In the context of determining the sufficiency of the evidence, the period of time used to determine if a conviction for a predicate offense is barred, should be the period of time established and proved by the evidence presented at trial.

Here, the evidence at trial proved that Appellant actually committed continuous sexual abuse of a child around the middle of the 2008-2009 school year through the summer of 2009. It is this 2008-2009 period of time that establishes whether the predicate offense occurred during or outside the period of time in which the continuous sexual abuse of a child was committed. Because the State alleged and proved that the continuous sexual abuse of a child and indecency with a child by contact occurred during two separate periods of time, Appellant is not being punished twice for the same offense.

Argument

> **Issue:** Did the panel err when it failed to find the evidence was legally insufficient to support the jury's finding of guilt beyond a reasonable doubt as to each and every element of the offense of indecency with a child by sexual contact, especially considering it unilaterally substituted a date of the offense contradictory to the indictment and the court's charge which created double jeopardy issues?

Appellant argues that the court of appeals erred in holding that the evidence was sufficient to support his conviction for indecency with a child by contact. As he did below, Appellant argues that the trial court specifically found that other counts with the same alleged on or about date occurred in Iowa when it granted Appellant's motion for directed verdict. Appellant also appears to argue that the court of appeals erred in choosing to rely on events that occurred in December 2011 in holding that the evidence was sufficient to support his conviction for indecency with a child by contact because that was not the date alleged in the indictment. In addition, Appellant now argues that when the court of appeals chose the December 2011 date for the indecency with a child by contact conviction, it created a double jeopardy issue because that date was within the time period that the continuous sexual abuse of a child was alleged to have occurred in the indictment. Contrary to Appellant's assertions, the court of appeals did not err in holding that the evidence is sufficient and the court of appeals has made it clear that it relied on two separate periods of time in determining the sufficiency of the evidence to support Appellant's convictions for continuous sexual abuse of a child and indecency with a child by contact.

First and foremost, the court of appeals properly held that Appellant had not moved for a directed verdict on the indecency with a child by contact count, and that the only evidence regarding the trial court's reasons for granting Appellant's motion for direct verdicts on counts 3, 4, 5, and 7, was because the State abandoned those counts. *Allen II*, 2018 WL 6065095, at *4-5. The evidence showed that the trial court did not state that it was granting Appellant's motion for directed verdict on the counts listed under the same alleged on or about date of September 25, 2009 because the offenses occurred in Iowa. Instead, the trial court granted the motion for directed verdict because the State abandoned those counts. 5 RR 8-15. And the record is clear that Appellant did not move for a directed verdict on this count. 5 RR 15.

In its opinion, the court of appeals further pointed out that Appellant made no other argument regarding the sufficiency of the evidence by asserting that he was out of the state on or about September 25, 2009, and he did not direct the court of appeals to any place in the record indicating that he might have been. *Allen II*, 2018 WL 6065095, at *5. Notwithstanding the fact that Appellant did not raise these arguments, the court of appeals held that the evidence was sufficient to support Appellant's conviction. *Id.* The court of appeals' holding is supported by the record.

A person commits indecency with a child by contact if the person engages in sexual contact with a child younger than seventeen years of age or causes the child to engage in sexual contact. Tex. Penal Code § 21.11(a). Sexual contact, as alleged in count six of the indictment in this case, includes any touching of any part of the body of child, including touching through clothing, with the genitals of a person. *Id.* § 21.11(c)(2).

Here, the victim testified that after the family moved back to Princeton, Texas from Iowa in December of the seventh grade, Appellant forced her to put her hand on his penis. 3 RR 244; 4 RR 189. The victim's mother testified that the family moved back to Texas in December 2011. 4 RR 244. This testimony alone was sufficient to support Appellant's conviction for indecency with a child by contact. *See* Tex. Code Crim. Proc. art. 38.07; *Martinez v. State,* 178 S.W.3d 806, 814 (Tex. Crim. App. 2005). Thus, the court of appeals did not err in holding that the above evidence from December 2011 was sufficient to support Appellant's conviction for indecency with a child by contact. *Allen II*, 2018 WL 6065095, at *5.

Next, Appellant appears to argue that the trial court erred in holding that his behavior in 2011 was sufficient to support his conviction for indecency by with a child contact because both the indictment and jury charge alleged that the offense occurred on or about September 25, 2009. It is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and is within the statutory limitation period. *Sanchez v. State*, 400 S.W.3d 595, 600 (Tex. Crim. App. 2013). Here, the State could prove that Appellant engaged in indecency with a child by contact on a date other than September 25, 2009 as long as that day was before February 16, 2016, the date the indictment was filed. There is no statute of limitations for indecency with a child by contact. Tex. Code Crim. Proc. art. 12.01(1)(E). Thus, the appellate court did not err when it determined that Appellant committed the offense of indecency with a child by contact in December 2011 even though the State alleged a different on or about date in the indictment and jury charge. *See Allen II*, 2018 WL 6065095, at *5 (addressing the fact that the date proved at trial differed from the date alleged, but that the phrase "on or about" permitted a conviction). Appellant has not directed this Court to any case law to suggest that the court of appeals' holding was improper.

Finally, Appellant argues that when the court of appeals chose the December 2011 date for the indecency with a child by contact conviction, it created a double jeopardy issue because that date was within the time period that the continuous sexual abuse of a child was alleged to have occurred in the indictment, which was October 1, 2009 through August 15, 2012. App. Brief, pp. 26-29. The State acknowledges that in its motion for rehearing, it alleged that the court of appeals' decision to rely on December 2011 as the date of the offense for indecency with a child by contact, created a double jeopardy issue. However, after reading the court of appeals' opinion on rehearing in *Allen II* and conducting more research on the issue, the State now concludes that because the State alleged that the continuous sexual abuse of child and indecency with a child by contact offenses occurred during two different periods of time and proved at trial that the two offenses occurred during different periods of time, there is no double jeopardy issue in this case.

The indictment and jury charge in this case alleged that Appellant committed continuous sexual abuse of a child on or about October 1, 2009 through August 15, 2012. CR 19, 231. The indecency with a child by contact was alleged to have occurred on or about September 25, 2009. CR 20-21, 231.

At trial, the victim testified that starting in the middle of the fourth grade, Appellant began making her touch his penis over his clothing with her hand. 4 RR 178-79, 202. This occurred once a month until they moved to Iowa, which according to the victim's mother, was in the summer between fourth and fifth grades. 3 RR 239; 4 RR 187. The evidence at trial showed that the relevant time period was the middle of the 2008-2009 school year and extended into the summer of 2009 before the family moved to Iowa. 2 RR 238-39, 242-44. This time period was relied on by the State at trial, by the State on direct appeal, and by the court of appeals in its holding that the evidence was sufficient to support Appellant's conviction for continuous sexual abuse of a child. 5 RR 71; *Allen II*, 2018 WL 6065095, at *2-3.

The victim further testified that after the family moved back to Princeton, Texas from Iowa in December of the seventh grade, Appellant forced her to put her hand on his penis. 3 RR 244; 4 RR 189. The victim's mother testified that the family moved back to Texas in December 2011. 4 RR 244. This time period was relied on by the State at trial, by the State on direct appeal, and by the court of appeals in its holding that the evidence was sufficient to support Appellant's conviction for indecency with a child by contact. 5 RR 71; *Allen II*, 2018 WL 6065095, at *5-6. Consequently, although the State alleged that the indecency with a child by contact occurred before the continuous sexual abuse of a child, it proved that the indecency occurred well after the continuous sexual abuse of a child

The court of appeals made it clear in *Allen II* that the offense of continuous sexual abuse of a child occurred around the middle of the 2008-09 school year into the summer of 2009, before the family moved out of state, and the offense of indecency with a child by contact occurred in December 2011. *Id.* at *2. It then held that because the evidence proved that the offenses occurred during two different periods of time, the offenses did not occur within the same period of time, and thus, there was no double jeopardy concern. *Id.* at *5.

A double jeopardy violation occurs if one is convicted or punished for two offenses that are the same in law and in fact. *Aekins v. State*, 447 S.W.3d 270, 277-78 (Tex. Crim. App. 2014). The continuous sexual abuse of a child statute clearly reflects that the Legislature intended to disallow dual convictions for the offense of continuous sexual abuse of a child and for the offenses enumerated as "acts of sexual abuse" when based on conduct against the same child during the same *period of time*. *See Price v. State*, 434 S.W.3d 601, 606 (Tex. Crim. App. 2014) (citing Tex. Penal Code §21.02(e)). A defendant charged with continuous sexual abuse of a child who is tried in the same criminal action for a predicate offense based on conduct committed against the same victim may not be convicted for both offenses unless the latter offense occurred outside the *period of time* in which the continuous sexual abuse offense was committed. *Id.* Excepting the situation where different *periods of time* are at issue, a fact finder could find a defendant guilty either of continuous sexual abuse, or, alternatively, an enumerated act of acts of sexual abuse. *See id.*

The question then is, when there is a difference between the period of time alleged and proved, which period of time controls in determining whether a conviction for a predicate offense is jeopardy barred— the period of time alleged in the indictment or the period of time proved at trial?

Appellant argues that because the State alleged in the indictment that Appellant committed continuous sexual abuse of a child on or about October 1, 2009 through August 15, 2012, any predicate offense proven to have occurred within that period of time is jeopardy barred. Thus, Appellant argues that the State is bound by the period of time alleged in the indictment regardless of what the evidence at trial proved.

But, in the context of determining the sufficiency of the evidence, the period of time used to determine if a conviction for a predicate offense is barred should be the period of time established and proven by the evidence presented at trial. Section 21.02(e) prohibits dual convictions for continuous and a predicate offense unless the predicate offense was charged in the alternative and occurred outside the period in which the continuous sexual abuse was *committed* or is considered by the trier of fact to be a lesser included offense. Tex. Penal Code §21.02(e). The statute's use of the word *committed* indicates a reliance on evidence and proof presented at trial, not the on or about date alleged in the indictment. Article 38.14 of the Code of Criminal Procedure similarly uses the phrase, "[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense *committed*." Tex. Code Crim. Proc. art. 38.14. And in determining whether the accomplice's testimony has been corroborated, the reviewing court looks to the evidence presented at trial. *See, e.g., Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008).

Thus, Appellant is incorrect that in this case jeopardy barred the State from obtaining a conviction for an offense proven to have been committed between October 1, 2009 and August 15, 2012 because the evidence at trial proved that Appellant actually committed continuous sexual abuse of a child around the middle of the 2008-2009 school year through the summer of 2009. It is this 2008-2009 period of time that establishes whether the predicate offense occurred during or outside the period of time in which the continuous sexual abuse of a child was committed.

This is not a case of material variance, nor is it a case involving a notice issue in the indictment. Indeed, Appellant has not asserted such in his briefing to this Court. Instead, he has framed his argument as an attack on the court of appeals' holding regarding the sufficiency of the evidence to support his conviction for indecency with a child by contact. In this case, the State both alleged and proved that the two offenses occurred during two different time periods, but the two periods of time proven differed from the dates alleged in the indictment. Appellant is not, therefore, being punished twice for the same offense.

The court of appeals made it clear in its opinion that it was relying on two separate and distinct periods of time in determining whether the evidence was sufficient to support Appellant's convictions for continuous sexual abuse of a child and indecency with a child by contact. *Allen II*, 2018 WL 6065095, at *5-6. The court of appeals did not err in holding that the evidence proved that the offenses occurred during two different periods of time, and thus, the offenses did not occur within the same period of time; therefore, there was no double jeopardy concern. The opinion of the court of appeals should be affirmed.

<u>Prayer for Relief</u>

The State of Texas prays that this Court will affirm the Court of Appeals' opinion in this case.

Respectfully submitted,

Greg Willis
Criminal District Attorney
Collin County, Texas

John R. Rolater, Jr.
Assistant Criminal District Attorney
Chief of the Appellate Division

<u>/s/ Amy Sue Melo Murphy</u>
Amy Sue Melo Murphy
Assistant Criminal District Attorney
2100 Bloomdale Rd., Suite 200
State Bar No. 24032600
asmurphy@co.collin.tx.us
(972) 548-4353
FAX (214) 491-4860

Certificate of Service

The State has e-served counsel for Appellant, Marc Fratter, through the eFileTexas.gov filing system and sent a courtesy copy to them by United States Mail at, 1207 West University Drive, Suite 101, McKinney, Texas, 75069, the 26th day of September 2019.

/s/ Amy Sue Melo Murphy
Amy Sue Melo Murphy
Assistant Criminal District Attorney

Certificate of Compliance

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 3,502 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/Amy Sue Melo Murphy_
Amy Sue Melo Murphy
Assistant Criminal District Attorney